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No. 92-646

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LUIS PULIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a warrant that contains information derived from an unlawful search is valid under *Murray* v. *United States*, 487 U.S. 533 (1988), if the government's decision to seek the warrant was not affected by the unlawful search and if the warrant would have established probable cause even without the information derived from the unlawful search.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 966 F.2d 964. The opinion of the district court (Pet. App. 20a-30a) and a related order of the district court on remand from the decision under review (Pet. App. 31a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was charged by an indictment in the United States District Court for the Southern District of Texas with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and distribution of cocaine, in violation of 21 U.S.C. 841 (1988 & Supp. III 1991). The district court granted petitioner's motion to suppress certain evidence seized pursuant to a search warrant, but the court of appeals reversed and remanded to the district court for further consideration of the suppression issue. Pet. App. 1a-19a.

1. On July 2, 1991, a Customs Service agent received information that drug trafficking was being conducted at a residence at 8996 Imogene Street, in Houston, Texas. After police officers established surveillance of the residence, a neighbor reported that many different cars arrived and departed at the residence in a pattern the officers believed to be typical of drug trafficking. The agent next learned from the electric company that the person listed for electric service at the Imogene Street residence also had established service at 7254 Regency Square Court in Houston. Officers then established surveillance of the Regency Square Court residence as well. Pet. App. 2a-3a.

At about 10:30 a.m. on July 3, 1991, Cesar Augusto Restrepo picked up petitioner at the Regency Square Court address in a blue Toyota. Under the observation of officers, the pair went to two shopping centers where petitioner made and received telephone calls on public telephones. Petitioner had a large wallet and a black ledger book in which he made notations. The two then drove to a residence at 13901 Hollowgreen

Street; petitioner made telephone calls on a cellular telephone during the drive. The two left the Hollowgreen residence after a short stay and drove to another store, where petitioner made further calls from another pay telephone. Restrepo subsequently picked petitioner up in the blue Toyota and dropped him off at the Regency Square Court address. Pet. App. 3a-4a.

After petitioner and Restrepo separated, the officers approached and questioned Restrepo briefly. Restrepo told the officers that he lived in New York but could not remember his address; he stated that he did not own the blue Toyota and did not know who did; and he stated that he did not know petitioner. With Restrepo's consent, the officers searched the Toyota. In the course of the search they found the black ledger and the wallet petitioner had been seen using. Shortly thereafter, a drug-sniffing dog alerted to the wallet—indicating the odor of narcotics—and Restrepo was arrested. Pet. App. 4a-5a.

The officers promptly returned to the Regency Square Court residence to interview petitioner, arriving about 15 minutes after they had left to follow Restrepo. They told the woman who answered their knock that they had information that narcotics were being distributed from the residence. The woman responded that she and her children were the only persons in the residence at the time, and she refused to allow the officers to search the residence. Nevertheless, justifying their action as a security sweep, the officers entered and found petitioner in the bathroom of the master bedroom. Pet. App. 5a.

An officer then departed to apply for a warrant to search the Regency Square Court, Imogene, and Hollowgreen residences, using the same supporting affidavit for each warrant. The affidavit recited the agent's experience with narcotics investigations, the facts set forth above, and that the officers "conducted a security sweep of the [Regency Square Court] residence to secure it until a search warrant could be obtained." Pet. App. 5a-6a. The affidavit also stated that, even though they were told that a woman and her children were the only persons in the residence, they found petitioner hiding in a bathroom, and that his name was different from the name in the wallet found in the Toyota. *Id.* at 6a-7a & n.2. After a warrant was issued, officers searched the Regency Square Court residence and discovered $15,000 in cash as well as drug and money ledgers. The officers then arrested petitioner. *Id.* at 25a; Gov't C.A. Br. 12. A search of the Imogene residence revealed 136 kilograms of cocaine, drug-related paraphernalia, a drug ledger, and $63,000 in cash. Gov't C.A. Br. 13.

2. The district court suppressed the evidence seized under the search warrant. Pet. App. 20a-30a. The court first concluded that the security sweep of the Regency Square Court residence was unlawful because it was not conducted in connection with petitioner's arrest. *Id.* at 28a. The court then ruled that the search warrant did not constitute an independent source for the evidence obtained during the searches, because the supporting affidavit contained information derived from the unlawful search. *Id.* at 29a-30a. The court rejected the government's argument that the warrant demonstrated probable cause

without the information derived from the protective sweep of the residence. The court concluded that it must assume, in the absence of contrary evidence, that the magistrate "relied upon the entire affidavit in making the decision to sign the search warrant. As such, *Murray* [v. *United States*, 487 U.S. 533 (1988),] commands that the independent source doctrine does not apply." Pet. App. 29a-30a.

3. The court of appeals reversed. Pet. App. 1a-19a. The court first rejected the district court's view that the warrant was automatically invalid because it included evidence derived from the illegal search. *Id.* at 8a-13a. Instead, adopting the methodology applied by this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the court concluded that the question is "whether the warrant affidavit, once purged of tainted facts and conclusions, contains sufficient evidence to constitute probable cause for issuance of the warrant." Pet. App. 13a. Applying that test, the court concluded that the warrant was valid. *Id.* at 13a-15a.[1] Finally, the court noted that the district court had not determined whether the officers' decision to seek the warrant was prompted by the illegal entry. The court therefore remanded the case to the district court with instructions to consider that question. *Id.* at 15a-17a.[2]

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[1] Judge Johnson concurred on this point, arguing that the majority should have remanded the case to the district court to allow the district court to make the initial determination regarding the adequacy of the warrant. Pet. App. 18a-19a.

[2] After the case was remanded, the district court denied the motion to suppress. Pet. App. 31a-40a. The court noted that the suppression hearing reflected that the only thing the

ARGUMENT

Petitioner contends (Pet. 5-21) that the court of appeals erred in determining that it is proper to uphold a warrant containing information derived from an unlawful search if the warrant contained sufficient information to establish probable cause even without the improperly obtained information. Petitioner does not suggest that any of the courts of appeals have adopted a different approach. In fact, the ruling of the court of appeals is consistent with the decisions of the other courts of appeals to consider the question after *Murray* v. *United States*, 487 U.S. 533 (1988). See, *e.g.*, *United States* v. *Herrold*, 962 F.2d 1131, 1137-1138 (3d Cir.), cert. denied, 113 S. Ct. 421 (1992); *United States* v. *Gillenwaters*, 890 F.2d 679, 681-682 (4th Cir. 1989); *United States* v. *Salas*, 879 F.2d 530, 537-539 (9th Cir.), cert. denied, 493 U.S. 979 (1989). Moreover,

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agents learned as a result of the protective sweep was that petitioner was in the house and that his name was Pulido. *Id.* at 37a. The district court concluded that this knowledge did not prompt the officers to seek the search warrant for the Imogene and Hollowgreen premises. *Ibid.*

On October 22, 1992, after the certiorari petition was filed, petitioner waived indictment and pleaded guilty to aiding and abetting the laundering of monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(B)(i). A plea agreement provides that the United States will move to dismiss the indictment that is the subject of the instant certiorari petition. The case before the Court is not moot, however, because the government has not yet dismissed the indictment in this case and because petitioner has indicated that he would seek to withdraw his guilty plea if the Court granted certiorari in this case. The sentencing hearing in the money laundering case is set for December 31, 1992.

this Court itself applied a similar approach to a warrant that contained tainted evidence in *United States* v. *Karo*, 468 U.S. 705, 719-721 (1984). Petitioner acknowledges *Karo*, but argues (Pet. 10) that it is inconsistent with the suggestion in *Murray* that a different rule would apply "if information obtained during [the illegal] entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. at 542.

Whatever the merits of petitioner's argument, this petition is not an appropriate vehicle for considering it. Most obviously, as the case comes to the Court, the matter is interlocutory. Although the lack of finality does not affect the Court's jurisdiction, see Robert Stern et al., *Supreme Court Practice* § 2.2 (6th ed. 1986), the Court has noted that the interlocutory nature of a case makes it unsuitable for plenary review because of the possibility that the issue presented in the petition will not affect the outcome of the proceeding. See *id.* § 4.18. That concern is particularly relevant here, where petitioner already has pleaded guilty to related charges pursuant to a plea agreement calling for dismissal of the indictment in this case even if the Court denies review. See note 2, *supra*. Hence, a resolution in petitioner's favor of the question presented by the petition would affect petitioner only if (a) petitioner were able successfully to withdraw his guilty plea; (b) petitioner could not be convicted without the evidence obtained pursuant to the warrant; and (c) petitioner would have been convicted after a full trial with that evidence.

Even if the Court were inclined to review the issue at this time, the petition does not squarely present

the question urged by petitioner, because the unlawful search did not uncover any obviously incriminating evidence.[3] Hence, it is not at all clear that the evidence secured from the unlawful search could be said to have "affected [the magistrate's] decision to issue the warrant" within the meaning of *Murray*, 487 U.S. at 542. Accordingly, the decision to uphold the warrant is consistent with a fair construction of *Murray*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The only substantial facts in the warrant that were derived from the unlawful search were the facts that (1) petitioner was located inside the residence, (2) the woman at the residence lied about petitioner's presence, and (3) petitioner identified himself as having a name different from the name found on the identification papers in the Toyota. See Pet. App. 6a-7a (quoting the relevant portion of the warrant). Although those facts may be suspicious, they are not strongly suggestive of involvement with narcotics trafficking. The magistrate's conclusion that petitioner was involved with narcotics is much more likely to have rested on the preexisting evidence (which included, among other things, the ledger and the wallet that had an odor of narcotics).